

MISC. CRIMINAL APPLICATION NOS. 1947 OF 1996  
2008 OF 1996, 2018 OF 1996 AND 2024 OF 1996.

Date of decision: 2.7.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

Misc. Cr.Application Nos.1947, 2008 & 2018 of 1996  
Mr. D.N. Patel, A.P.P. for petitioners.  
Mr. M.J. Budhbhatti, advocate for respondents.

Misc. Cri.Application No. 2024 of 1996.  
Mr. P.J. Kanabar, advocate for petitioners.  
Mr. D.N. Patel, A.P.P. for respondent-State.

1. Whether Reporters of Local Papers may be allowed  
to see the judgment?No
2. To be referred to the Reporter or not?No
3. Whether their Lordships wish to see the fair copy  
of judgment?No
4. Whether this case involves a substantial question  
of law as to the interpretation of the  
Constitution of India, 1950 or any order made  
thereunder?No
5. Whether it is to be circulated to the Civil  
Judge?No

Coram: R. R. Jain, J.

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2nd July, 1996.

Oral judgment (CAV):

Misc. Criminal Application Nos.1947, 2008 and 2018 of  
1996 have been preferred by the State of Gujarat under  
Section 439 (2) of the Criminal Procedure Code ('the  
Code' for short hereinafter) for cancellation of bail

granted by learned Special Judge, Amreli, in favour of concerned respondents in the matter of Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as 'NDPS Act' for short). At the time of admission of these applications, this Court stayed operation of the impugned orders and issued non-bailable warrants against concerned respondents and thus despite grant of bail by learned Special Judge, Amreli, the respondents/accused have not been released on bail. Consequently, hearing of main applications is given priority.

Aggrieved by the order passed by this Court, opponent No.1 in Misc. Criminal Application No. 1947 of 1996 has preferred Misc. Criminal Application No.2024 of 1996 for recalling the order passed by this Court on 10.5.1996 issuing non-bailable warrants, therefore, with the consent of parties this application is also heard alongwith the main petition.

Since common question of law is involved in all the aforesaid matters, with the consent of parties, are disposed of by this common judgment.

It would be worthwhile to state that as regards the question of facts, there is no dispute between the parties and yet for the sake of convenience, the facts are briefly stated as under:

In Misc. Criminal Application No. 1947 of 1996, offence was registered against both the respondents at Damnagar Police Station, District Amreli, at C.R.No.II-11/96 for the offence under Section 15 of the NDPS Act for possessing approx. 725 Kg. of Poppy straw (Posh na doda). Respondent No.1 was found in possession of 464 Kgs and respondent No.2 was in possession of 260.8 Kgs. of Poppy straw. After arrest, respondents preferred Criminal Misc. Application No.184 of 1996 before the Special Court, Amreli and the learned Special Judge was pleased to allow the application and released respondents on bail vide order dated 1.5.1996.

In Misc. Criminal Application No.2008 of 1996, offence was registered against the respondent under Sections 15, 26 and 29 of NDPS Act at Amreli City Police Station vide C.R.No.69 of 1996 for possessing 167 Kgs. of Poppy Straw (posh na doda). After arrest, respondent preferred Criminal Misc. Application No. 292 of 1996 which was decided on 10.5.1996 in favour of respondent who was released on bail.

Similarly in Misc. Criminal Application No.2018 of 1996,

offence was registered against respondent under Sections 15, 26 and 29 of NDPS Act for possessing 149 Kgs. of Poppy Straw (posh na doda). The respondent preferred Criminal Misc. Application No. 197 of 1996 which was allowed by the learned Special Judge by order dated 1.5.1996 releasing the respondent on bail.

Being aggrieved by the aforesaid orders, State of Gujarat has preferred these applications for cancellation of bail under Section 439 (2) of the Code.

In all the petitions filed by State respondents are represented by Mr. M.J. Budhbhatti. In Misc. Criminal Application No. 2024 of 1996 Mr. P.J. Kanabar appears on behalf of the petitioner.

On plain reading of the impugned orders, on the face of it, it transpires that placing reliance upon the judgment reported in 1993 (2) G.L.R. 1743, the learned Judge has come to conclusion that the goods seized from the respondents is not opium poppy a prohibited substance, as defined in Section 2 (xvii) of the NDPS Act, and therefore, cannot be said to have committed any offence under the NDPS Act much less under Sections 15, 26 and 29 thereof.

Mr. D.N. Patel, learned A.P.P. has argued that the impugned orders are arbitrary, illegal and reflect non-application of mind and, therefore, liable to be quashed and set aside by this Court.

Learned advocates for respondents have raised preliminary objection as to jurisdiction of this Court to look into arbitrariness and illegality of the order while exercising powers under Section 439 (2) of the Code. Relying upon judgment in the case of Dolat Ram v. State of Haryana, (1995) 1, SCC 349, it is argued that the cancellation of bail should not be a mechanical process without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom. They have argued that cancellation of bail already granted has to be considered in light of cogent and overwhelming circumstances. While emphasising on the ground of cancellation of bail, it is stated that the grounds (illustrative and not exhaustive) are, interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. Similarly, satisfaction of the court, on the basis of material

placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. It is true that these are common grounds for cancellation of bail and are generally canvassed. But at the same time when there is gross miscarriage of justice or illegality or arbitrariness apparent on the face of record, in my view, this Court has power to interfere. That the powers conferred under Section 439 (2) of the Code are very wide and have to be exercised for due administration of justice in accordance with law. If a subordinate court has committed any illegality, arbitrariness or error apparent on the face of record, this Court cannot sit with folded hands and eyes closed and permit to remain in force making mockery of justice.

Similarly, if the order in question is vitiated with any serious infirmity of law, this Court has unfettered right to interfere and set aside. It is true that while considering question of cancellation of bail, likelihood of the accused fleeing from justice and tampering with prosecution evidence affecting fair trial in the court of justice shall be given paramount importance. Due and proper weightage should be bestowed on these two factors. But at the same time other factors relating to just and proper administration of justice have also to be looked into. There cannot be any strict formula in cancellation of bail. Facts and circumstances of each case should be taken into account while considering application for cancellation of bail.

On this point I am also fortified by the view taken by this Court in the case of State of Gujarat v. Lalji Popat, 1988 (2) G.L.R. 1073. After considering catena of decisions rendered by the Supreme Court in this connection, it has been observed in paragraph 22 of that judgment that when arbitrariness or illegality can be seen on the face of order passed by subordinate court, then this court can quash and set aside under Section 439 (2) or under Section 482 of the Code. In the cases in hand, the State of Gujarat has approached under Section 439 (2) of the Code and, therefore, in my view, applications are maintainable.

Now coming on merits, the respondents have raised two contentions i.e., (1) That the substance found in possession of the respondents is not a narcotic substance as defined under NDPS Act and (2) the respondents are licence holders and if at all are found in possession of substance in excess of quality prescribed under the licence then at the most shall be deemed to have

committed offence for breach of licence only and not under NDPS Act.

#### Contention No.1

The respondents have relied upon judgment of Division Bench of this Court in the case of *Hathi @ Mangalsinh v. State*, 1993 (2) G.L.R. 1743. The learned Special Judge has also placed heavy reliance upon this judgment and has arrived at the conclusion that the substance in question is not covered under the definition of opium poppy as defined under Section 2 (xv) of the NDPS Act. But, in my view, reliance on the aforesaid judgment by the lower court is nothing else but misreading of it. For correct application/ interpretation, every judgment or document has to be read as a whole and not a particular observation in isolation divorced with the context in which it is made. Similarly, reliance should not be placed on the head notes because head notes are not prepared by the courts but by the reporter. Many a times preparation of head-notes are likely to be influenced by human error. If one reads the entire judgment can safely hold that what is reflected in head-note is not the finding and intention of the Division Bench. It is not the finding that in all the cases Poppy Straw (posh na doda) is not covered within the definition of Section 2 (xv) of the NDPS Act. What is observed by the court is that simply finding of fragmented or well fragmented poppy capsule by itself does not become opium poppy but to bring within the mischief of the NDPS Act, fragments of poppy capsules must be the parts of opium as defined in Section 2 (xvii) of the NDPS Act. According to this definition, opium poppy is defined as

- a) the plant of the species *Papaver somniferum* L.; and
- b) the plant of any other species of *Papaver* from which opium or any phenanthrene alkaloid can be extracted and which the Central Government may, by notification in the Official Gazette, declare to be opium poppy for the purpose of this Act.

In light of this observation by the Division Bench, it is crystal clear that if Poppy Straw (posh na doda) belongs to the species of *Papaver* then it is definitely a substance prohibited under the NDPS Act and anyone found in possession shall be deemed to have committed offence under the NDPS Act.

Poppy Straw is defined in Section 2 (xviii) of the NDPS Act as:

"'Poppy straw' means all parts (except the seeds)

of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom"

It is not in dispute that in the cases in hand after seizure, the substance was sent to Forensic Science Laboratory for its report. On the strength of botanical examination/result or biological analysis finding is placed on record. Accordingly, on botanical examination, that is, chemical analysis, the contents of the substances have been found to be poppy straw as defined under NDPS Act, that is, the sample contents were found to be all parts of opium poppy as defined under Section 2 (xvii) of the NDPS Act and the is of species of Papaver as covered thereunder. Report of botanical examination shows that the substances seized was wall poppy capsule (poppy straw). Therefore, prima facie the material seized is nothing else but poppy straw which is a species of Papaver as defined under the NDPS Act.

The learned Special Judge has failed to appreciate this aspect of the report in light of observations made by the Division Bench in the case of Hathi @ Mangalsinh (supra). It would be pertinent to note that the material placed before the Division Bench simpliciter disclosed that the substance seized was identified as fragments of poppy capsule (posh na doda). There was nothing on record to suggest that posh na doda or fragments of poppy capsules were belonging to the species of Papaver or Papaver somniferum and, therefore, the Division Bench was pleased to call for the report from the laboratory and concerned expert was examined as court witness. In that case despite examining concerned expert as court witness it was not proved that the substance belonged to species of Papaver. The report simpliciter suggested that the substance is opium poppy capsules and, therefore, in the facts and circumstances of the case, it was held that fragments of poppy capsule (posh na doda) are not a substance prohibited under the NDPS Act.

In the light of the aforesaid facts and circumstances, in my view, the observations made by the learned Special Judge are not in accordance with the ratio laid down by Division Bench of this Court. Apparently the judgment has been misread and misinterpreted. Therefore, the orders in question being illegal and arbitrary deserve to be quashed and set aside.

Contention No.2

It is also argued on behalf of the respondents that as

respondents are licence holders and if the quantity in excess thereof is held by them then it would be simpliciter an offence for the breach of licence and not under the NDPS Act. In my view, this argument is not palatable for two reasons (i) even the breach of conditions of licence is also made offence under Section 15 of the NDPS Act. Under this Section whoever, in contravention of any provision of the NDPS Act or any rule or order made or condition of a licence granted thereunder, produces, possesses, transports, imports inter-State, exports inter-State, sells, purchases, uses or omits to warehouse poppy straw or removes or does any act in respect of warehoused poppy straw, shall be punishable and (ii) when the possession itself is made an offence and when the possession of the goods in excess of quantity authorised under the licence would be unlawful making offence under Section 15 of the NDPS Act. Consequently, prima facie, the respondents shall be deemed to have committed offence punishable under Sections 15, 26 and 29 of the NDPS Act. Offence under this Act is offence against society and is an attempt to break back bone which ultimately affects the future generation of this country. The minimum punishment prescribed under NDPS Act is imprisonment for 10 years and fine of Rs.1,00,000/- The offence under this Act is serious in nature and, therefore, has to be viewed seriously. Consequently, the accused cannot be set at liberty.

In the result, all the three applications preferred by the State of Gujarat are allowed. The impugned orders passed by the learned Special Judge, Amreli, are set aside. Rule is made absolute accordingly. Since at the admission stage non-bailable warrant was issued against the respondents who are already in jail, no further order is required to be passed for their arrest. In light of the aforesaid observation and order, Misc. Criminal Application No.2024 of 1996 does not survive and, therefore, is rejected.